

JOHN H. DONBOLI (SBN: 205218)
 E-mail: jdonboli@delmarlawgroup.com
 JL SEAN SLATTERY (SBN: 210965)
 E-mail: sslattery@delmarlawgroup.com
DEL MAR LAW GROUP, LLP
 12250 El Camino Real, Suite 120
 San Diego, CA 92130
 Telephone: (858) 793-6244
 Facsimile: (858) 793-6005
 Attorneys for Plaintiff: LOUISE
 CLARK

SHANNON L. HOPKINS (Admitted
Pro Hac Vice)
 Email: shopkins@zlk.com
 NANCY A. KULESA (Admitted *Pro*
Hac Vice)
 Email: nkulesa@zlk.com
LEVI & KORSINSKY, LLP
 733 Summer Street, Suite 304
 Stamford, CT 06901
 Telephone: 212-363-7500
 Facsimile: 866-367-6510
 Attorneys for Plaintiff: ROBYN
 MARNELL

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

LOUISE CLARK, an individual and on)	CASE NO. 14-CV-1404 JLS WVG
behalf of all others similarly situated,)	
) PLAINTIFF'S REQUEST FOR
Plaintiff,)	JUDICIAL NOTICE OF ORDER
) <u>DENYING</u> MOTION TO DISMISS
vs.)	COMPLAINT BASED ON
) FEDERAL PREEMPTION BY
CITIZENS OF HUMANITY, LLC, a)	HON. DANA M. SABRAW ON
Delaware Limited Liability Company;)	OCTOBER 27, 2014
MACY'S, INC., a Delaware)	
Corporation; and DOES 1 through 100,)	Date: January 22, 2015
inclusive,)	Time: 1:30pm
) Ctrm: 4A
Defendants.)	Judge: Hon. Janis L. Sammartino
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1 TO THIS HONORABLE COURT, THE CLERK OF THE COURT, ALL
2 PARTIES, AND THEIR ATTORNEYS OF RECORD:

3 Plaintiffs Louise Clark (“Plaintiff Clark”) and Robyn Marnell (“Plaintiff
4 Marnell” collectively, with Plaintiff Clark, “Plaintiffs”) respectfully request that
5 this Court take judicial notice pursuant to Federal Rule of Evidence 201 of the
6 Hon. Dana M. Sabraw’s recent order **denying** a motion to dismiss based on federal
7 preemption in a case styled as *Paz v. AG Adriano Goldschmeid, Inc. et al.*, Case
8 No. 14-cv-1372 DMS (DHB). (A true and correct copy of the Order denying the
9 Motion to Dismiss Complaint, dated October 27, 2014, is attached hereto as
10 Exhibit “A”).

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1 The Motion to Dismiss Complaint that was denied by the Hon. Judge
2 Sabraw is extremely similar to the Motion to Dismiss First Amended Complaint
3 currently pending before this Honorable Court as Docket No. 23 because both
4 motions contend and/or contended that the California "Made in USA" statute
5 (codified at California Business & Professions Code section 17533.7) is preempted
6 by the FTC Act and the Textile Fiber Products Identification Act.

7 Dated: January 2, 2015

Respectfully submitted,

8
9 DEL MAR LAW GROUP, LLP

10
11 By: /s/John H. Donboli

12 John H. Donboli

13 E-mail: jdonboli@delmarlawgroup.com

JL Sean Slattery

14 E-mail: sslattery@delmarlawgroup.com

15 Attorneys for: LOUISE CLARK, an
16 individual and on behalf of all others
17 similarly situated

18 LEVI & KORSINKSY, LLP

19 By: /s/Shannon L. Hopkins

20 Shannon L. Hopkins (admitted *pro hac*
21 *vice*)

E-mail: shopkins@zlk.com

22 Nancy A. Kulesa (admitted *pro hac*
23 *vice*)

E-mail: nkulesa@zlk.com

24 Attorneys for: ROBYN MARNELL, an
25 individual and on behalf of all others
26 similarly situated
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EXHIBIT "A"

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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 DAVID PAZ, an individual and on
11 behalf of all others similarly situated,
12 Plaintiff,

13 vs.

13 AG ADRIANO GOLDSCHMEID,
14 INC., a California corporation, et al.,
15 Defendants.

CASE NO. 14cv1372 DMS (DHB)

**ORDER DENYING MOTION TO
DISMISS COMPLAINT**

16 This case comes before the Court on the motion of Defendants AG Adriano
17 Goldschmeid, Inc. ("AG") and Nordstrom, Inc. to dismiss Plaintiff's Complaint.
18 Plaintiff filed an opposition to the motion, and Defendants filed a reply. For the reasons
19 set out below, the Court denies Defendants' motion.

20 **I.**

21 **BACKGROUND**

22 This putative class action case concerns the sale and marketing of Defendant
23 AG's products. AG is a designer and manufacturer of denim jeans products for men
24 and women. (Compl. ¶ 6.) It sells its products through its own retail stores, online and
25 through other high end retailers such as Defendant Nordstrom. (*Id.*)

26 One of AG's products is "The Protégé" brand jean. (*Id.*) This product, like many
27 of AG's other products, is marked with a "Made in the U.S.A." label. (*Id.* ¶ 19.)
28 Plaintiff alleges that on May 16, 2014, he purchased a pair of "The Protégé" brand jeans

1 at a Nordstrom store in San Diego, California. (*Id.*) Plaintiff alleges he relied on this
2 representation when purchasing the jeans, and that he “believed at the time he
3 purchased THE PROTÉGÉ that he was supporting U.S. jobs and the U.S. economy.”
4 (*Id.* ¶ 20.)

5 Plaintiff alleges, however, that the jeans “actually contain[] component parts
6 made outside of the United States.” (*Id.*) Specifically, he alleges the fabric, thread,
7 buttons, rivets, and/or certain subcomponents of the zipper assembly of the jeans (and
8 presumably all other offending AGAG apparel products) are manufactured outside the
9 United States. (*Id.* ¶ 15.)

10 In light of this alleged disparity, Plaintiff filed the present case on behalf of “all
11 persons in the United States who purchased one or more of Defendants’ AGAG apparel
12 products during the relevant four-year statutory time period that bore a ‘Made in the
13 U.S.A.’ country of origin designation but that contained foreign-made component
14 parts[.]” (*Id.* ¶ 26.) He also alleges claims on behalf of a subclass of “all of
15 Defendants’ California customers who purchased AGAG apparel products that were
16 labeled as ‘Made in the U.S.A. OF IMPORTED FABRIC’ that contained foreign-made
17 component parts beyond the fabric (e.g., rivets, thread, buttons, and/or subcomponents
18 of the zipper assembly) during the relevant four-year statutory time period[.]” (*Id.* ¶
19 27.) In the Complaint, Plaintiff alleges the following claims for relief: (1) violation of
20 California’s Consumer Legal Remedies Act, California Civil Code § 1750, *et seq.*, (2)
21 violation of California’s Unfair Business Practices Act, California Business and
22 Professions Code § 17200, *et seq.* and (3) violation of California Business and
23 Professions Code § 17533.7. In response to the Complaint, Defendants filed the present
24 motion.

25 II.

26 DISCUSSION

27 Defendants move to dismiss the Complaint in its entirety on the ground
28 Plaintiff’s claims are preempted by the Federal Trade Commission Act (“FTCA”) and

1 the Textile Fiber Products Identification Act (“TFPIA”). Plaintiff disputes that his
2 claims are preempted by either statute.

3 “The preemption doctrine stems from the Supremacy Clause. It is a ‘fundamental
4 principle of the Constitution [] that Congress has the power to preempt state law.’”
5 *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1022 (9th Cir. 2013), *cert. denied by*
6 *Arizona v. Valle del Sol, Inc.*, ___ U.S. ___, 134 S.Ct. 1876 (2014), (quoting *Crosby v.*
7 *Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000)). “There are ‘three classes of
8 preemption’: express preemption, field preemption and conflict preemption.” *Id.*
9 (quoting *United States v. Alabama*, 691 F.3d 1269, 1281 (11th Cir. 2012)).

10 In this case, Defendants rely on the doctrine of conflict preemption. With
11 conflict preemption, “state law is naturally preempted to the extent of any conflict with
12 a federal statute.” *Id.* at 1023 (quoting *Crosby*, 530 U.S. at 372). Conflict preemption
13 “has two forms: impossibility and obstacle preemption.” *Id.* (citing *Crosby*, 530 U.S.
14 at 372). “Courts find impossibility preemption ‘where it is impossible for a private
15 party to comply with both state and federal law.’” *Id.* (quoting *Crosby*, 530 U.S. at
16 372). “Courts will find obstacle preemption where the challenged state law ‘stands as
17 an obstacle to the accomplishment and execution of the full purposes and objectives of
18 Congress.’” *Id.* (quoting *Arizona v. United States*, ___ U.S. ___, 132 S.Ct. 2492, 2501
19 (2012)) (internal quotation marks omitted).

20 Analysis of a preemption claim “must be guided by two
21 cornerstones of [the Supreme Court’s] jurisprudence. First, the purpose
22 of Congress is the ultimate touchstone in every pre-emption case. Second,
23 [i]n all pre-emption cases, and particularly in those in which Congress has
24 legislated ... in a field which the states have traditionally occupied, ... we
start with the assumption that the historic police powers of the State were
not to be superseded by the Federal Act unless that was the clear and
manifest purpose of Congress.”

25 *Id.* (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)) (internal quotation marks
26 omitted). As the parties asserting preemption, Defendants carry the burden of proof.
27 *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 414 n.21 (2d Cir.
28 2013).

1 **A. The FTCA**

2 The FTC was established to prevent corporations “from using unfair methods of
3 competition in or effecting commerce and unfair or deceptive acts or practices in or
4 affecting commerce.” 15 U.S.C. § 45(a)(2). The specific provision of the FTCA at
5 issue in this case is 15 U.S.C. § 45a, which concerns labels on products. It states, in
6 pertinent part:

7 To the extent any person introduces, delivers for introduction, sells,
8 advertises, or offers for sale in commerce a product with a “Made in the
9 U.S.A.” or “Made in America” label, or the equivalent thereof, in order to
10 represent that such product was in whole or in substantial part of domestic
11 origin, such label shall be consistent with decisions and orders of the
12 Federal Trade Commission issued pursuant to section 45 of this title. This
13 section only applies to such labels. Nothing in this section shall preclude
14 the application of other provisions of law relating to labeling.

15 15 U.S.C. § 45a.

16 After this statute was passed, the FTC issued an Enforcement Policy Statement
17 “to give general guidance on making and substantiating U.S. origin claims.” “Made in
18 USA” and Other U.S. Origin Claims; Notice, 62 Fed. Reg. 63,755, 63,765 (Dec. 2,
19 1997). In that Statement, the FTC:

20 set[] forth the requirement that where a product is labeled or advertised
21 as “Made in USA,” the marketer should possess and rely upon a
22 reasonable basis that the product is all, or virtually all, made in the United
23 States. A product that is “all or virtually all” made in the United States is
24 described typically as one in which all significant parts and processing that
25 go into the product are of U.S. origin, *i.e.*, where there is only a *de*
26 *minimus*, or negligible, amount of foreign content.

27 *Id.* If further guidance is necessary, the FTC will consider three factors: “whether the
28 final assembly or processing of the product took place in the United States; the portion
of the total manufacturing cost of the product that is attributable to U.S. parts and
processing; and how far removed from the finished product any foreign content is.” *Id.*

29 The parties agree this section of the FTCA allows for the use of a “Made in
30 U.S.A.” label even if the product includes or contains material from a foreign country.
31 They also agree that California Business and Professions Code § 17533.7 does not
32 allow the use of a “Made in U.S.A.” label unless the product and all articles, units and

1 parts thereof were “entirely or substantially made, manufactured, or produced” in the
2 United States. *See* Cal. Bus. & Prof. Code § 17533.7.¹ The parties agree these statutes
3 set out different standards for the use of a “Made in U.S.A.” label, but disagree as to
4 whether that difference results in conflict preemption.

5 As stated above, conflict preemption exists ““where it is impossible for a private
6 party to comply with both state and federal law.”” *Valle del Sol*, 732 F.3d at 1032
7 (quoting *Crosby*, 530 U.S. at 372). Defendants argue it is impossible for them to
8 comply with these two statutes when it comes to products like those at issue here,
9 namely products that contain some foreign content, because the federal law would allow
10 them to use the “Made in U.S.A.” label while the state law would not as parts of the
11 subject merchandise were allegedly made outside of the United States. The Court
12 agrees that with these types of products California law prohibits the use of a “Made in
13 U.S.A.” label whereas federal law does not. However, the Court disagrees that this
14 results in conflict preemption.

15 Although the laws set out different standards for the use of “Made in U.S.A.”
16 labels, it would not be impossible for Defendants to comply with both laws. Outside
17 California, Defendants could use the “Made in U.S.A.” labels, but inside California,
18 they could not. This may be burdensome for Defendants, but it is not impossible for
19 them to do so. *See Greater Los Angeles Agency on Deafness, Inc. v. Cable News*
20 *Network, Inc.*, 742 F.3d 414, 429-30 (9th Cir. 2014) (quoting *National Ass’n of the Deaf*
21 *v. Netflix, Inc.*, 869 F.Supp.2d 196, 205 (D. Mass. 2012)) (internal quotation marks
22 omitted) (“To the extent that the federal captioning scheme and the DPA may require
23 different captioning requirements or deadlines, these differences do not ‘create a
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25

26 ¹ Cal. Bus. & Prof. Code § 17533.7 states in its entirety: “It is unlawful for any
27 person, firm, corporation or association to sell or offer for sale in this State any
28 merchandise on which merchandise or on its container there appears the words ‘Made
in U.S.A.’, ‘Made in America,’ ‘U.S.A.’, or similar words when the merchandise or any
article, unit, or part thereof, has been entirely or substantially made, manufactured, or
produced outside of the United States.” Cal. Bus. & Prof. Code § 17533.7.

1 positive repugnancy between the two laws' or otherwise demonstrate an irreconcilable
2 conflict between federal law and the DPA because CNN can comply with both.”)

3 Defendants also argue California law creates an obstacle to the accomplishment
4 and execution of the FTCA.² They assert one of the purposes of the FTCA “was to give
5 the FTC authority to determine the circumstances in which use of [“Made in U.S.A.”]
6 labels would be misleading or not misleading.” (Reply Br. at 8.) They also argue the
7 statute evidences Congress intent to preempt the field of “Made in U.S.A” labels.³

8 The Court agrees with Defendants that one purpose of the FTCA was to give the
9 FTC authority to regulate “Made in U.S.A.” labels. However, delegating that authority
10 to the FTC is not the same as depriving other agencies or states from exercising that
11 same authority. The general provision of the FTCA gives the FTC the power to direct
12 and prevent all manner of persons and entities “from using unfair methods of
13 competition in or affecting commerce and unfair or deceptive acts or practices in or
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15 ² It is worth noting the California law and the federal law are meant to serve the
16 same purpose, namely to prevent the deceptive marketing and promotion of products
17 as “Made in U.S.A.” See *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th
18 663, 689 (2006) (stating policies underlying the federal and California law are the same).
19 Accurate labeling of this information, in turn, allows consumers to make informed
20 decisions about whether their purchases “support fellow Americans” or “harm the
21 American manufacturing base[.]” 62 Fed. Reg. at 63758-59. These corresponding
22 benefits are echoed in the California law. See *Kwikset Corp. v. Superior Court*, 51 Cal.
4th 310, 329 (2011) (quoting *Colgan*, 135 Cal. App. 4th at 689) (stating purpose of
California law “is to protect consumers from being misled when they purchase
products in the belief that they are advancing the interests of the United States and its
industries and workers.”) Given that the purposes of the statutes are the same, it is not
apparent on the present facts how compliance with one would be an obstacle to the
other.

23 ³ Defendants deny any reliance on field preemption, but their argument sounds
24 otherwise. Defendants’ reluctance to argue field preemption is understandable as it
25 would require a showing that Congress, acting within its proper authority, has
26 determined the field of “Made in U.S.A.” labels “must be regulated by its exclusive
27 governance.” *Arizona v. United States*, 132 S.Ct. at 2501. As stated by the Supreme
28 Court, “The intent to displace state law altogether can be inferred from a framework of
regulation ‘so pervasive ... that Congress left no room for the States to supplement it’
or where there is a ‘federal interest ... so dominant that the federal system will be
assumed to preclude enforcement of state laws on the same subject.’” *Id.* (quoting *Rice*
v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Neither of these inferences is
reasonable given the statutory language at issue here (15 U.S.C. § 45a) or the general
subject matter of the statute (consumer protection), which has traditionally been a
matter of state concern. *Chae v. SLM Corp.*, 593 F.3d 936, 944 (9th Cir. 2010).

1 affecting commerce.” 15 U.S.C. § 45(a)(2). However, states are free to exercise that
2 power, as well, as evidenced by the many state consumer protection laws, including
3 those in California. Indeed, “consumer protection laws have traditionally been in state
4 law enforcement hands.” *Chae*, 593 F.3d at 944. Thus, “we start with the assumption
5 that the historic police powers of the States were not to be superseded by the Federal
6 Act unless that was the clear and manifest purpose of Congress.” *Rice*, 331 U.S. at 230
7 (citations omitted). The delegation of authority to the FTC to regulate “Made in
8 U.S.A.” labels does not demonstrate a “clear and manifest purpose” to supersede state
9 laws on such labels.

10 Defendants’ argument that the statute evidences Congress’s intent to preempt the
11 field of “Made in U.S.A.” labels is, likewise, unpersuasive. In support of this argument,
12 Defendants rely on that portion of the statute that reads: “This section only applies to
13 such labels. Nothing in this section shall preclude the application of other provisions
14 of law relating to labeling.” 15 U.S.C. § 45a. Defendants read this portion of the
15 statute as indicating that Congress intended this statute to be the exclusive authority on
16 “Made in U.S.A.” labels while leaving other labeling concerns open to other
17 regulations. However, this portion of the statute can also be read as an indication that
18 Congress intended this statute to apply only to “Made in U.S.A.” labels as opposed to
19 other kinds of labels, *e.g.*, qualified U.S. origin claims, claims about specific processes
20 or parts and comparative claims. *See* 62 Fed. Reg. at 63,769-70. Contrary to
21 Defendants’ suggestion, there is nothing in this portion of the statute that indicates
22 Congress intended to preempt the field of “Made in U.S.A.” labels.

23 In light of the above, the Court finds Defendants have failed to show Plaintiff’s
24 claims are preempted by the FTCA.

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28 **B. The TFPIA**

1 In addition to arguing preemption under the FTCA, Defendants argue Plaintiff's
2 claims are preempted by the TFPIA. Specifically, Defendants rely on 15 U.S.C. §
3 70b(b)(5), which states:

4 Except as otherwise provided in this subchapter, a textile fiber product
5 shall be misbranded if a stamp, tag, label, or other means of identification,
6 or substitute therefor authorized by section 70c of this title, is not on or
affixed to the product showing in words and figures plainly legible, the
following: ...

7 (5) If it is a textile fiber product processed or manufactured in the United
8 States, it be so identified.

9 15 U.S.C. § 70b(b)(5). Defendants argue, as they did with the FTCA, that it is
10 impossible for them to comply with this federal statute and California law.

11 Defendants argue the TFPIA *requires* them to use a "Made in U.S.A." label even
12 if the garment includes foreign-made materials, whereas California law *prohibits* the
13 use of a "Made in U.S.A." label unless the entire garment is made entirely or
14 substantially in the U.S.A. The Court agrees with the latter statement, but disagrees
15 with the former.

16 Although the TFPIA requires that textile fiber products processed or
17 manufactured in the United States be so identified, it does not require an unqualified
18 "Made in U.S.A." label if the product is made, either in whole or in part, of imported
19 materials. Rather, in that case the TFPIA requires that the label disclose those facts, *i.e.*,
20 that it state "Made in USA of imported fabric." *See* 16 C.F.R. § 303.33(a)(3). Thus,
21 contrary to Defendants' suggestion, the TFPIA does not require labeling that is
22 prohibited by California law. As with the FTCA, it is not impossible for Defendants
23 to comply with both statutes. They can simply indicate on the label that their products
24 were "Made in U.S.A. of imported fabric and components," or something similar that
25 accurately describes where the parts of the product and the product as a whole were
26 sourced and made.

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1 Defendants argue this is not a viable option because California law prohibits the
2 use of “Made in U.S.A.” on a label even if it is qualified with other language. In other
3 words, Defendants assert a qualified label such as “Made in U.S.A. of imported fabric
4 and components” would violate California law regardless of the qualifying language
5 because the label still states the product is “Made in U.S.A.” In support of this
6 argument, Defendants rely on the statute and case law.⁴ However, neither supports
7 Defendants’ argument.

8 On its face, the statute makes it unlawful to sell or offer for sale in California any
9 merchandise using the words “Made in U.S.A.” or similar words if “the merchandise
10 or any ... part thereof [] has been entirely or substantially made, manufactured, or
11 produced outside of the United States.” Cal. Bus. & Prof. Code § 17533.7. The statute
12 is silent on qualified labels, such as “Made in U.S.A. of imported fabric and
13 components,” and thus fails to provide any guidance on whether such labels would
14 violate the law.

15 Case law also fails to provide any guidance as the labels at issue in the cases were
16 unqualified, *i.e.*, they simply stated the products were “Made in U.S.A.” *See Kwikset*,
17 51 Cal. 4th at 317; *Colgan*, 135 Cal. App. 4th at 672.

18 The lack of guidance on qualified labels, however, does not preclude the Court
19 from using its common sense. California Business and Professions Code § 17533.7 is
20 part of California’s False Advertising Law (“FAL”), which prohibits false and
21 misleading advertising statements, in general. *See* Cal. Bus. & Prof. Code § 17500. If
22 a product is made in the U.S.A. with imported fabric and components, and the label
23 accurately reflects that, then there is no falsity or misrepresentation. The product is

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25 ⁴ Defendants also rely on Plaintiff’s Complaint, which they read as targeting all
26 products labeled with the phrase “Made in U.S.A.,” whether that phrase is qualified or
27 not. (Reply Br. at 5 n.3.) The Court does not read Plaintiff’s Complaint to be so broad.
28 Rather, it appears Plaintiff is focused on those products that include an unqualified
“Made in U.S.A.” label where the product includes component parts that were either
sourced or manufactured overseas and products that include a label stating “Made in
U.S.A. of imported fabric” when the products include parts, other than just the fabric,
that were sourced or manufactured overseas. Plaintiff does not appear to be targeting
products that include a qualified “Made in U.S.A.” label regardless of its accuracy.

1 what it is described to be, "Made in U.S.A. of important fabric and components." The
2 words "Made in U.S.A." or "U.S.A." do not make the label inherently misleading, and
3 they must be read in context. If the purpose of the false advertising law is to protect
4 consumers from fraud and deceit, it is difficult to see how that purpose is not served,
5 or is affirmatively violated, by a label that accurately describes where a product and all
6 its component parts are sourced and manufactured. Defendants' argument to the
7 contrary, that section 17533.7 prohibits such labels, even when they are accurate and
8 not misleading, strains the purpose of the statute, the FAL in general and common
9 sense.

10 In light of the above, the Court finds Defendants have failed to show Plaintiff's
11 claims are preempted by the TFPIA.

12 **III.**

13 **CONCLUSION**

14 In sum, Defendants have not shown Plaintiff's claims are preempted by either the
15 FTCA or the TFPIA. Accordingly, the Court denies Defendants' motion to dismiss.

16 **IT IS SO ORDERED.**

17 DATED: October 27, 2014

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20 HON. DANA M. SABRAW
21 United States District Judge
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